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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1688

JONAL CORPORATION,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN R. RISHER, JR.
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

Attorneys for Respondent,
District Building,
Washington, D. C. 20004
Telephone: 629-3916

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QUESTION PRESENTED

Whether a proceeding before the District of Columbia Contract Appeals Board denied petitioner, a contractor, fundamental fairness and due process of law simply because two of the Board's three members were Assistant Corporation Counsel for the District of Columbia and another Assistant Corporation Counsel presented the legal position of the District of Columbia Department involved in the contractual dispute tendered to the Board for resolution.

STATEMENT

In a complaint for money due filed in the United States District Court for the District of Columbia on April 4, 1973, petitioner allleged that on May 1, 1967, it entered into a contract with the District of Columbia for the construction of two water pollution control plant buildings for the sum of $297,000.00, that it was thereafter required by the District to construct the buildings to a greater height than that called for by the contract plans and specifications, and that it was required to perform certain paving work not included in the plans and specifications. Petitioner invoked the jurisdiction of the District Court under D. C. Code, 1973, § 11-501(4), and demanded judgment against the District of Columbia in the sum of $171,726.13. (Pet. App. 2a-4a, 15a, 45a.)

The District of Columbia answered the complaint and thereafter moved for summary judgment asserting that disputes arising out of contracts entered into by the District are reviewable by its Contract Appeals Board (hereinafter "CAB") under the standards prescribed by the Wunderlich Act (41 U. S. C. §§ 321-322), and that the District Court's review was restricted to whether the decision of the CAB, adverse to petitioner, was supported by substantial evidence. Petitioner opposed the motion for summary judgment, claiming that the CAB, as established and constituted, violated the Due Process Clause of the Fifth Amendment to the Constitution and also violated the Wunderlich Act. The CAB was created by order of the Commissioner of the District of Columbia. Each panel of the CAB consists of two Assistant Corporation Counsel and a third member who is employed by a District of Columbia Department other than that involved in the particular appeal. Petitioner claimed that, because the position of the Department involved in CAB cases is presented by another Assistant Corporation Counsel, CAB proceedings lack the fundamental fairness which the Constitution and the Wunderlich Act require. (Pet. App. 3a-5a, 15a-18a, 45a-46a.)

On November 27, 1973, the court entered summary judgment in the District's favor. In its memorandum and order, the court ruled that petitioner's procedural due process contention was "newly injected into the case in * * * [petitioner's] opposition to the District's motion for summary judgment." The court noted that "[a]t no point in the administrative proceedings nor in its complaint," did petitioner raise the "constitutional objection that the * * * [CAB,] as established and constituted, violates the Fifth Amendment Due Process Clause." The court accordingly concluded that petitioner's constitutional claim "must fail for want of jurisdiction since the claim was not properly pleaded as a matter of form." The court went on to conclude that, applying Wunderlich Act standards, the decision of the CAB "was based on substantial evidence, and was not arbitrary or capricious." (Pet. App. 46a-50a.)

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the District of Columbia Circuit. The Counrt of Appeals similarly observed that petitioner had presented its constitutional challenge in a dilatory manner, stating (Pet. App. 5a-6a) that:

> The * * * [District] argues, in support of the District Court's ruling, that * * * [petitioner's] procedural due process claim was belatedly proffered and improperly pleaded. This position has some justification. The Contract Appeals Board was established in 1953 and its composition, function and authority have remained essentially unchanged since its inception. * * * Yet, Jonal Corporation's constitutional objection to the Board's composition was not presented until after the contract containing the questioned grievance procedure had been knowledgeably executed in 1967 by its representative, the administrative procedure

> had been completely exhausted on the contract issues, the case had been filed and fully pleaded in the District Court, and the defendant had filed a motion for summary judgment. Since the constitutional defect is allegedly inherent in the grievance procedure, the plaintiff, in fairness, ought to have presented its position at an earlier stage of the process. * * * (Footnotes omitted.)

Nonetheless, the court held (id. at 6a) that it

> * * * need * * * not reach the issue of whether such a delay in presenting the claim operates to bar this Court from further considering the argument, for we conclude that * * * [petitioner's] procedural due process contention is lacking in substance.

The court went on the reject petitoner's related Wunderlich Act contention (id. at 9a-13a) but, upon considering petitioner's assertion that the District Court did not have the benefit of all portions of the administrative record in reviewing the decision of the CAB, the court concluded (id. at 13a) that:

> * * * In the interests of justice, * * * the case should be remanded so that the District Court, if it has not already done so, may consider all pertinent parts of the administrative record * * *.

Following the denial of a petition for rehearing and a suggestion for rehearing *en banc* (Pet. App 28a-40a), petitioner filed in this Court a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advances no ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the

Rules of this Court. And see *Fields* v. *United States*, 205 U. S. 292, 296 (1907). Petitioner does not present a case involving a specific claim of bias or prejudice based on a tainted personal or pecuniary interest of a government official in a particular matter. Instead, petitioner attempts to structure a general bias *per se* argument around the performance by different attorneys employed by the Office of the District of Columbia Corporation Counsel of the presenting and adjudicating functions in CAB proceedings. As both lower courts noted, however (Pet. App. 5a-6a, 46a-47a), such an argument was not advanced until a late stage of the District Court litigation. Cf *Bell* v. *Hood*, 327 U. S. 678, 681-682 (1946). Both lower courts also noted (Pet. App. 5a-6a, 14a, 48a) that petitioner is no stranger to government contracts and agreed in advance to submit disputes to the CAB for decision with full knowledge of the composition, functions, and authority of the CAB.

The CAB, like its federal counterparts, is created by agency regulation rather than by legislative enactment. Its authority, as a reviewing unit in the Office of the Commissioner of the District of Columbia, derives solely from an order of the Commissioner. See Organization Order No. 9, D. C. Code, 1973, Title 1, Appendix, at 235-236. Its jurisdiction is contractual, arising as it does under Article 15 of the Contract in question (Petition at 6-7), which contains a "disputes clause" like that set forth in contracts enetred into by federal agencies. Like most of its federal counterparts, the CAB functions substitutionally as the representative or *alter ego* of the Commissioner of the District of Columbia, in the sense that its decisions are not reviewed by the Commissioner prior to their final issuance. See *Gunnell Construction Co.* v. *Contract Appeals Board*, 282 A. 2d 556 (D. C. App., 1971); compare S. Doc. No. 99, 89th

Cong., 2nd Sess., *Operation and Effectiveness of Government Boards of Contract Appeals,* at 20-21. *S&E Contractors, Inc.* v. *United States,* 406 U. S. 1, 17-18 (1972). Petitioner does not suggest that CAB decisions are in any manner subject to review by the Corporation Counsel, and its position in this respect is quite consistent with both Organization Order No. 9 and the Rules of Procedure under which the CAB operates. See 36 District of Columbia Register 23-24, Part 15. The decision of the Court of Appeals that the fundamental fairness mandated by procedural due process and the Wunderlich Act is not *ipso facto* subverted simply because a Board staffed by two Assistant Corporation Counsel resolves matters in which the contracting agency is represented by another Assistant Corporation Counsel conflicts with no decision of this Court or of any circuit court of appeals. Indeed, when the case is considered in light of principles articulated by this Court, it becomes readily apparent that petitioner has failed to present a question of gravity or general national importance sufficient to warrant the issuance of the extraordinary writ it seeks.

The administrative procedure of which petitioner complains is no less offensive than a procedure whereby the accusatory or prosecutive and the adjudicative functions are combined in members of the same government agency. Yet this Court has held with consistency that such a procedure, standing alone, does not violate due process. See *Withrow* v. *Larkin,* 421 U. S. 35 (1975); *Marcello* v. *Bonds,* 349 U. S. 302 (1955); *Fahey* v. *Mallonee,* 332 U. S. 245, 256 (1947).

In *Marcello,* this Court held (349 U. S. at 311) that a deportation hearing was not stripped of its impartiality simply because the presiding officer was subject to the supervision and control of officials charged with investiga-

tive and prosecuting functions. And as the Court of Appeals noted (Pet App. 8a), *Marcello*

> * * * has consistently been interpreted to stand for the general proposition that the combination in administrative procedures of judging with prosecuting or investigating functions is not, *per se,* a denial of due process. * * * (Citations omitted.)

More recently in *Withrow,* the plaintiff, a physician, sought to enjoin enforcement of a Wisconsin statute which gave the state medical examining board the power to suspend licenses after holding its own contested hearing. Although the hearing was a full adversary proceeding, the board not only initiated the charges leading to suspension but also conducted its own investigation and rendered a decision based on the evidence presented to it (421 U. S. at 46). In refusing to accept a bias *per se* theory analogous to that advanced here, this Court noted that there is a legitimate distinction to be drawn between cases in which an adjudicator has "a pecuniary interest in the outcome" or in which "he has been the target of personal abuse or criticism from the party before him" and cases in which an agency combines investigative or accusatory functions and adjudicative functions (421 U. S. at 47). In the latter instance, there is a "presumption of honesty and integrity in those serving as adjudicators" (id.) and the "processes utilized by the Board * * * do not in themselves contain an unacceptable risk of bias" (421 U. S. at 54). By parity of reasoning, the performance by different Assistant Corporation Counsel of the presenting and adjudicating functions at CAB proceedings does not, in and of itself, rise to the level of an arguable denial of fundamental fairness or due process sufficient to warrant an exercise of this Court's certiorari jurisdiction.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN R. RISHER, JR.
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

Attorneys for Respondent,
District Building,
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